The evidence for the prosecution on this point was thus, to say the least of it, very vague. In the absence, however, of anything else to cast doubt upon the complainant's evidence I would have hesitated to interfere with the decision of the learned President who had the advantage of seeing the complainant in the witness-box.

It was pointed out on behalf of the appellant, however, that the complainant having given evidence that he went to the Police Station the next morning and made a report, the report was not produced in evidence. In my opinion the failure to produce the report in this case was fatal to the prosecution case. If the report had told a story similar to that told by the complainant in the witness-box it would have been admissible in evidence under section 157 of the Evidence Ordinance. If the report did not support the complainant's story in the witness-box then he could have been cross-examined upon it under section 145 of the Evidence Ordinance. As, however, the report was not produced at all it appears to me that section 114 illustration (g) applies, and I must, therefore, presume that the report would have been unfavourable to the prosecution case. If this were so, the complainant's evidence would have been discredited, and the whole case for the prosecution would have fallen to the ground.

The Deputy Public Prosecutor conceded that the omission to produce the report was an irregularity and sought to rely upon section 448 of the Criminal Procedure Code. As, however, he also admitted that, as the case stood, the presumption was that the report would not have corroborated the complainant's evidence I do not think section 448 can assist him. Where, as in this case, the omission cuts at the root of the prosecution evidence, a failure of justice is occasioned, because the appellant has thereby "lost the chance, which was fairly open to him, of being acquitted" (see remarks of Channell, J. in *Rex v. Cohen*[1]).

For these reasons I set aside the Order of the Juvenile Court and acquitted the appellant and ordered that any costs paid under the Order of the Juvenile Court be repaid to the father.

Order accordingly.

ACHIAMAN ALAPAPAN & 2 ORS. v. REX.

[App. Crim. Juris. (Rogers, J.) March 15, 1952]

[Singapore — Magistrate's Appeal No. 185 of 1951]

Mental Disorders Ordinance, s. 56 — Charge of ill-treatment of Mental Hospital inmate — Misconduct of accused connected with inmate's suffering must be proved.

At 11 a.m. on 22nd September, 1951 the appellants, who were attendants at Woodbridge Mental Hospital, were seen to push an inmate from ward 3 to outside it; at that time the inmate was not violent, sad or crying. At 4.45 p.m. of the same day the inmate was found crying on the floor of ward 4. Extensive blue marks were found on the body, jaw and legs; such injuries could not have been self-inflicted and might have been caused several hours previously by the patient being dragged along the ground. The appellants were convicted of ill-treatment of the patient under section 56 of the Mental Disorders Ordinance.

Held, that to sustain a charge of ill-treatment the misconduct of the appellants must be connected with the inmate's suffering.

Case referred to:—

(1) *Reg. v. Pelham* 8 Q.B. 959.

MAGISTRATE'S APPEAL.

L. Rayner (Crown Counsel) for the Crown.

K. A. Seth and *N. N. Leicester* for the appellants.

Cur. Adv. Vult.

Rogers, J. : — In my opinion this appeal should be allowed, and I do so allow it. but because of the apparent importance of the matter to all those involved, and also because I do not lightly differ from so experienced a magistrate as Mr. Clague on a question of fact, I am giving my reasons at some length.

From the evidence called by the prosecution in this case it appears that about 11.00 a.m. on 22nd September 1951 an attendant at the Woodbridge Mental Hospital named Chintamany was outside Ward 2, and through the grill she could see these 3 appellants pushing an inmate along. It would appear that the pushing process began in the ward and was then continued outside, but it is not very easy to place the operation with accuracy, as the witness under cross-examination changed the story both as to her own position and as to that of the others. In answer to the learned magistrate this witness replied that the inmate was not violent when she was being pushed. She was not being very sad. The witness did not hear her crying, and there was no one else present.

The important fact which emerges from this evidence is that, whatever she saw, the witness did not think it either necessary or advisable to report it until several hours later that afternoon.

The next witness was another attendant called Parvathy. She was working that morning in Ward 3, but does not mention the exact time. While working she heard a noise, went out to see what it was and saw the 3 appellants taking the inmate away. They held her by the hands and led her away. Each of them held her by the arms, but the witness expressly says that she saw them do nothing more beside pushing her along.

Such is the evidence as to what occurred that morning, and for my part I cannot see that it divulges on the part of the appellants any conduct towards the inmate which could be described as aggressive or any behaviour which could be considered improper. Those, whose lot it is to attend to the requirements and well-being of lunatics, have a difficult task to carry out, and it is impossible to lay down with any degree of inflexibility a system of rules and regulations by which their task should be performed. It may for example frequently be necessary for an attendant to use his or her hands to guide or push an inmate, simply because the inmate in question is incapable of taking in what has been said to him, and has to be made to do what a normal person would do by just being told. As Parvathy remarks "Things of this nature happen regularly." Such use of hands, however, must not extend to ill-treatment, and it is to provide against such ill-treatment *inter alia* that the Mental Disorders Ordinance has been passed. I am not prepared to hold on the testimony of the 2 witnesses referred to, that such ill-treament occurred in their presence.

The next evidence as to the inmate is that of the head attendant Lee Eng Siew who says that at 4.45 that afternoon she was returning home off duty in Ward 4, when she saw the said inmate crying on the floor of the ward. The inmate made a complaint and the witness examined her, finding extensive blue marks on her body, jaw and legs. I gather that the inmate could only just have come in, or if she had been in some time, she can only just have started crying. It is inconceivable, if she had been there crying consistently over a period of time, that the witness should not have noticed it. She herself had been on duty in the ward so she says, and would have been all the more certain to notice the inmate's distress as there were no other patients there at the time. Either then, the inmate had entered the ward crying and in a state of distress, in which case the witness's attention would have been drawn to her, or else she entered the ward calmly and then suddenly threw herself on the floor in tears. The latter is more likely to have been the case, although on the evidence I do not think it possible to arrive at a definite finding in the matter. However, the head atttendant then called Sister Gavin, and she in turn examined the inmate in Ward 9 where she found the various injuries she has described. It is manifest to me that the inmate couldn't have sustained them merely from the treatment she had received from the appellants as described by the witnesses that morning. There were multiple abrasions and bruises on her limbs, trunk and face. She was also in a very distressed mental condition. She had bruises on both shoulder blades, legs, knees and ankles, one under her chin and on her chest. Such injuries says the sister could not have been self inflicted. They might have been caused by the patient being dragged along the ground, and they might have been caused several hours previously. It is further established from Sister Gavin's description of this inmate and her delusions, that her detention in this establishment was abundantly justified, and that an atmosphere of violence in her vicinity might at any time be expected. The only other witnesses called by the prosecution were the acting Matron and Dr. Brown the Superintendent, neither of whom had seen or heard anything at the time of the matters in dispute. In fact it was only the following morning at 9 o'clock that Sister Gavin reported to the acting Matron what she had seen that previous afternoon.

It does not appear from the record that any submission was made at the close of the prosecution, and the magistrate did not stop the case, although I think he might very well have done so had the question been brought to his attention.

All the evidence amounted to was that these 3 appellants were seen pushing the inmate along in the wards at 11.00 a.m. and that at 4.45 p.m. she was suddenly noticed in great distress and with far more severe injuries than the morning's treatment could have possibly inflicted. Somebody must have assaulted her, whether wilfully or under provocation we cannot say, and it is most unfortunate that nobody was about when the assault was committed. There must have been plenty of noise of struggling, beating, and possibly

screaming as well, and it strikes me as being most extraordinary that in a busy establishment such as this, no one should have heard it. However, that is the position as it emerges from the magistrate's notes and short of any further evidence which could connect these appellants with those serious injuries as found by Sister Gavin, I find it impossible to uphold the conviction. In his grounds the magistrate expressly states that he disbelieves that the inmate attacked the 1st appellant, and no doubt he discounted the evidence of all the appellants, as he was thoroughly entitled to do. But, after all, it was not for them to satisfy him of their innocence, but for the prosecution to satisfy him of their guilt, and this in my opinion they failed to do. He says that none of them made any attempt to report the matter to anyone in authority. But why should they, if they were only doing that which was an every day occurrence? Again he says they simply left her alone on the floor of the ward suffering from physical injuries and severe mental disorder. But where is the evidence of this? They were last seen pushing her along a passage, and nearly 6 hours later she was found in a ward, on the floor and in distress. There is a complete mystery as to what happened during those 6 hours, wherein she seems to have disappeared from all supervision, and to have sustained considerable harm. If there was any misconduct on the part of these appellants, in so far as they may have committed some breach of hospital regulations, then such misconduct cannot be said to be in the least connected with the inmate's subsequent suffering, and it was laid down in *Regina v. Pelham*[1] that such connection is essential to a charge of ill-treatment.

For these reasons I allow this appeal and direct a verdict of acquittal to be entered.

Appeal allowed.

K. SOCKALINGA MUDALIAR v. S. ELIATHAMBY & ANOR.

[Court of Appeal (Mathew, C.J., Pretheroe and Thomson, JJ.) March 15, 1952]

[Ipoh — F.M. Civil Appeal No. 62 of 1951]

Japanese Judgments and Civil Proceedings Ordinance, s. 4 — Pre-Occupation promissory note — Suit instituted during the Japanese occupation but not proceeded with — Application for extention of term refused and action dismissed — Fresh suit instituted — Res judicata — Civil Procedure Code, s. 5.

In 1942, during the Japanese occupation of Malaya, the appellant instituted proceedings against the respondents on a promissory note made before the war; nothing further was done beyond the filing of the suit. After the liberation the appellant applied in 1947 for leave to carry on the proceedings of the Japanese Court under section 4 of the Japanese Judgments and Civil Proceedings Ordinance 1946; the application was dismissed on the ground that the Moratorium Proclamation was in force. The Proclamation was repealed as from 1st October, 1949 and in March 1950 the appellant applied for an extension of time to make a further application under the Japanese Judgments and Civil Proceedings Ordinance for leave to carry on the Japanese proceedings This was dismissed on the ground that the affidavit in support did not reveal any special grounds justifying the grant of extension. In May 1950 the appellant brought the present action based on the same cause of action as he had sued on in the Japanese Court. The suit was dismissed on the ground that as the appellant had elected to seek his remedy by attempting to carry on the Japanese proceedings he was not at liberty to take any other proceedings.

Held on appeal, that as the Japanese proceedings had never been heard nor finally decided there was no question of **res judicata** nor was there any withdrawal of them so as to preclude the institution of a fresh suit in respect of the same subject matter. Nevertheless, the appellant was not precluded by statute to bring the present suit, the true effect of section 5 of the Civil Procedure Code being not to preclude him from such an action but to prevent the Court from proceeding with the trial; the Court could, however, stay all proceedings until the Japanese proceedings had been determined. But at the date of the trial, the Japanese Court being dead, the Japanese proceedings were no longer pending and the appeal must be allowed.

COURT OF APPEAL.

R. D. Hume and *K. C. Chan* for the appellant.

M. S. Mahendran for the respondents.

Cur. Adv. Vult.

Thomson, J. : — To appreciate the question at issue in this appeal it will be desirable to set out the course of the litigation between the parties.

On 2nd November, 1942, during the Japanese occupation, the appellant instituted proceedings against the respondents in the Japanese Court on a pre-occupation promissory note dated 2nd November, 1939. A plaint was filed and summonses were issued but apparently no further steps were taken during the occupation.

On 10th February, 1947, the appellant applied by way of originating summons for leave to carry on the proceedings which he had commenced in the Japanese Court as proceedings in this Court in accordance with section 4 of the Japanese Judgments and Civil Proceedings Ordinance, 1946. That application was dismissed, apparently for the reason, which may or may